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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 285

SAMUEL HANNAH FOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 75–81) are reported at 162 F. 2d 54.

JURISDICTION

The judgment of the circuit court of appeals was entered June 12, 1947 (R. 81), and a petition for rehearing (R. 82–84) was denied August 2, 1947 (R. 85). The petition for a writ of certiorari was filed August 21, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the duty to register for selective service continued beyond the date fixed for registration, so that one who failed to register on the date fixed and did not thereafter register could be prosecuted for such failure more than three years after the date on which he should have registered.

2. Whether the evidence is sufficient to sustain the finding of the trial court, sitting without a jury, that petitioner was under 45 years of age on February 16, 1942 (Third Registration Day), and whether, in any event, that finding was vital, it being undisputed that petitioner was under 65 years of age on April 27, 1942 (Fourth Registration Day).

STATUTES AND REGULATIONS INVOLVED

The Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, as amended by the Act of December 20, 1941, c. 602, § 1, 55 Stat. 844, provided in pertinent part:

> SEC. 2 [50 U. S. C. App., Supp. V. 302]. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places,

and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

* * * * *

SEC. 10 [50 U. S. C. App. 310]. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

* * * * *

SEC. 11 [50 U. S. C. App. 311]. * * * any person * * * who * * * evades registration * * * or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction * * *, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

18 U. S. C. 582 provides in pertinent part:

No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.

Presidential Proclamation No. 2535, issued January 5, 1942, and designating Third Registration Day (7 F. R. 177), provided in pertinent part:

> 2. (a) Every male citizen of the United States, and every other male person residing in the continental United States * * * is required to and shall on February 16, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board * * * if such male citizen or other male person on December 31, 1941, has attained the twentieth anniversary of the day of his birth and on February 16, 1942, has not attained the forty-fifth anniversary of the day of his birth, and has not heretofore been registered * * *.

Presidential Proclamation No. 2541, issued March 19, 1942, and designating Fourth Registration Day (7 F. R. 2181), provided in pertinent part:

> 2. (a) Every male citizen of the United States, and every other male person residing in the continental United States * * * is required to and shall on April 27, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board * * * if such male citizen or other male person on February 16, 1942, had attained the forty-fifth anniversary of the day of his birth and on April 27, 1942, has not attained the sixty-fifth anniversary of the day of his birth, and has not heretofore been registered * * *.

Section 611.5 of the Selective Service Regulations (6 F. R. 6842) provided in pertinent part:[1]

> § 611.5 *Responsibility for performance of duty.*— * * *.
>
> * * * * *
>
> (d) The duty of every man subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such man is not registered on the day fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.
>
> * * * * *

STATEMENT

A single-count indictment (R. 1–2) filed January 22, 1947, in the District Court for the Northern District of Texas charged that petitioner, on or about February 16, 1942, with intent to evade military service, wilfully failed to register with a selective service draft board, in violation of the Selective Training and Service Act of 1940, as amended, and the regulations and orders thereunder. Following a trial by a judge, a jury having been waived (R. 18), petitioner was found guilty and sentenced to 18 months' imprisonment and to pay a fine of $1,000 (R. 4–5). On appeal,

[1] This section was originally Paragraph 205 of the Regulations. The renumbering became effective as of February 1, 1942. (6 F. R. 6841.)

the judgment of conviction was affirmed, one judge dissenting (R. 81).

The Government established at the trial that petitioner, an alien resident of the United States, never registered for selective service (R. 21, 27, 30), and that fact is not disputed (see R. 38; Pet. 10). The Government further proved that on or about February 7, 1946, and again on September 12, 1946, petitioner stated under oath to a naturalization examiner of the Immigration and Naturalization Service, in a proceeding to establish his lawful entry into the United States as a preliminary to filing a declaration of intention to become a citizen, that he was born on July 10, 1898 (R. 19–20, 23). If that was petitioner's birth date, he was 43 years old on February 16, 1942, and was required by the terms of Proclamation No. 2535 (*supra*, pp. 3–4) to register for selective service on that date.

Petitioner's defense was that the prosecution was barred by the statute of limitations (R. 3, 36–40) and that in any event he had attained the age of 45 prior to February 16, 1942, so that he did not fall within the age group required to register by Proclamation No. 2535 (R. 44–52). Petitioner's evidence in respect of his age consisted of the testimony of his brother Joseph, who testified that he, Joseph, came to the United States from Poland in 1912 at the age of 21 (R. 46) and that shortly thereafter he sent for peti-

tioner, who arrived in the United States on June 18, 1913, at which time petitioner was "close to twenty" (R. 47). According to Joseph's testimony, therefore, petitioner was 48 years old on February 16, 1942, and thus not within the age group specified in Proclamation No. 2535. Joseph admitted that "in the old Country, they actually kept no exact date of birthdays." He explained how he knew that he himself was 21 when he emigrated to the United States by saying that he left Poland to avoid being called into the Russian Army, departing four weeks before his induction was due, and that this was the only way he could recall his age at the time of his emigration. (R. 52.) He explained how he knew petitioner's approximate age by saying that there was "around two and a half years difference" between their ages according to "what my mother used to tell" (R. 50). Petitioner himself did not testify.

ARGUMENT

1. Petitioner contends that, assuming he was under 45 years of age on February 16, 1942, his failure to register for selective service on that date, without excuse, constituted a "completed * * * offense * * * irrespective of any duty he had thereafter to register, compliance with which would not have cancelled the completed crime" (Pet. 5; see also Pet. 10, 14) and that therefore, since the indictment was filed more than three years after that date, the prose-

cution was barred by the statute of limitations (*supra,* p. 3) (Pet. 8, 9–16). Section 611.5 (d) of the Selective Service Regulations provided, however, that the duty to register "shall continue at all times" and that if for any reason a man subject to registration "is not registered on the day fixed for his registration, he shall immediately present himself for and submit to registration * * *" (*supra,* p. 5). Clearly, therefore, while petitioner committed the offense of failure to register on February 16, 1942, his failure to register thereafter constituted a day-to-day continuation of the original offense up to and including the date of the indictment. Just as other continuing failures to perform duties imposed by law, such as failure of a registrant to keep his draft board advised of his address (*United States* v. *Guertler,* 147 F. 2d 796, 797 (C. C. A. 2), certiorari denied, 325 U. S. 879), failure to keep records as required by law (*United States* v. *Belfast Fabrics Corporation,* 65 F. Supp. 567 (S. D. N. Y.)), concealment of assets of a bankrupt (see 11 U. S. C. 52 (d); *United States* v. *Nazzaro,* 65 F. Supp. 456 (S. D. N. Y.)), etc., have been held to constitute continuing offenses, so too the crime of failing to register for selective service was a continuing offense, expressly so declared by the terms of Regulation 611.5 (d).[2]

[2] Conceding that "there was a continuing duty to register" under this regulation, petitioner seeks to explain away the relevance of this continuing duty in respect of when

Petitioner seeks to demonstrate that his failure to register on February 16, 1942, completed the offense so as to start the period of limitations running from that day by pointing out that subsequent compliance with his continuing duty to register "would not have cancelled the completed crime" (Pet. 5, 10, 14). Of course, any continuing offense is complete in the sense that once it starts the offender subjects himself to criminal liability which he cannot thereafter extinguish by terminating the course of his illegal conduct.

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the statute of limitations began to run by arguing that "No doubt this continuing duty was set out in the regulations in order to reach those citizens or residents who were confined in the penitentiary, or who were sick, or who were beyond the confines of the United States on the date set for the registration" (Pet. 14), with the result, evidently, that a further registration date was set for those thus circumstanced, and their duty was not exhausted. It should be pointed out, however, that Sections 611.3 and 611.4 (6 F. R. 6842) were specifically designed to cover men who were outside areas where local boards were organized and who were inmates of various types of institutions on the day fixed for registration, and established other times for their registration, and that the various Proclamations by which registration days were designated themselves provided that a man who was unable to register on the day fixed "because of circumstances beyond his control" should do so "as soon as possible after the cause for such inability ceases to exist" (see, e. g., Proclamation No. 2535 (7 F. R. 177, 178) and Proclamation No. 2541 (7 F. R. 2181, 2182)). But there can be no doubt, in view of the unequivocal language of Section 611.5 (d), that it applied to all cases of non-registration regardless of the reason, good or bad, and imposed a continuing duty to register irrespective of the circumstances which occasioned the failure to register.

Thus, one who enters into a conspiracy which has ripened into a punishable crime by the commission of an overt act may not avoid his criminal liability for what was done by affirmative withdrawal. Similarly, where the continuing offense is negative in character, i. e., failure to do some act required, criminal liability that is once incurred cannot be avoided by subsequently doing the act. But the real effect of doing the act is to terminate an offense which would otherwise continue. And, concomitantly, until there is such an affirmative termination of continuing criminal conduct, the statute of limitations does not begin to function.

Cases like *United States* v. *Irvine,* 98 U. S. 450, *Warren* v. *United States,* 199 Fed. 753 (C. C. A. 5), and *United States* v. *Salberg,* 287 Fed. 208 (N. D. Ohio), relied on by petitioner (Pet. 10–13) and by the dissenting judge below (R. 79), are clearly distinguishable from the present case since in none of those cases was the offense involved declared to be continuous in nature by the statute defining the offense, or by any regulation issued pursuant to it.[3]

[3] The *Salberg* case held that a prosecution for failure to register under the Selective Service Act of May 18, 1917, commenced more than three years after the date on which registration should have occurred, was barred by the statute of limitations. However, the opinion in that case refers to no regulation under that Act providing that the duty to register should continue at all times after the registration day fixed.

It is true that the indictment in this case alleged that the offense occurred "on or about the 16th day of February, A. D. 1942" (R. 1). It would have been better pleading, no doubt, to have charged that the offense continued to the time of the indictment or to a time within three years of its return. However, since the proof showed that petitioner had never registered and since the court could take judicial notice of the regulation making the duty to register a continuing obligation, clearly no prejudice resulted from this technical deficiency in the indictment. It is well settled, of course, that it is unnecessary "to prove that the offence was committed upon the day alleged, unless a particular day be made material by the statute creating the offence. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient." *Ledbetter* v. *United States,* 170 U. S. 606, 612; see also *Hale* v. *United States,* 149 F. 2d 401, 403 (C. C. A. 5), certiorari denied, 326 U. S. 732; *United States* v. *Perlstein,* 126 F. 2d 789, 798 (C. C. A. 3), certiorari denied, 316 U. S. 678; *Winslett* v. *United States,* 124 F. 2d 302, 303 (C. C. A. 5). Analogously, where, as here, the indictment charges that the offense occurred on or about a day antedating the period of limitations, and the proof shows that the offense commenced on the day alleged, but continued down to the time of the indictment, the lack of an allegation

of continuance is equally immaterial and non-prejudicial.[4]

Petitioner's cognate contention that, even assuming he was under a continuing duty to register after February 16, 1942, and assuming he was born on July 10, 1898, his duty to register ceased when he attained the age of 45 on July 10, 1943, which was also beyond the three-year limitations period preceding the return of the indictment (Pet. 16), is equally without merit. Presidential Proclamation No. 2535 (*supra*, pp. 3–4) specifically directed that those under 45 on February 16, 1942, should register, and Regulation 611.5 (d) (*supra*, p. 5) specifically provided that that duty should be a continuing one. The regulation made no exception as to anyone who attained the age of 45 after the crucial date.

2. Petitioner also contends that the Government failed to prove beyond a reasonable doubt that he was under 45 on February 16, 1942, and so within the age group required to register on that date (Pet. 5, 8–9, 17–19). The Government estab-

[4] Petitioner points out (Pet. 12), correctly (*Fiswick* v. *United States*, 329 U. S. 211, 216; *United States* v. *Kissel*, 218 U. S. 601, 607), that "the mere continuance of the result of a crime does not continue the crime," but that principle has no relevance here. The Government relies, not on a continuance of the result of petitioner's failure to register, but on the express terms of Regulation 611.5 (d), issued pursuant to statutory authority (Section 10 (a) (1) of the Act, *supra*, p. 3), to show the continuing nature of that offense.

lished, however, from petitioner's own sworn statements before the naturalization examiner, made before the return of the indictment in this case and consequently before the materiality of his age in connection with this prosecution had become evident, that he was born on July 10, 1898, which would have made him well under 45 on February 16, 1942 (*supra,* p. 6). As pointed out by the majority opinion below, since petitioner's parents were dead and birth records were not available, these sworn statements were the best evidence available as to petitioner's age (R. 77). Certainly, the trial court was not bound to believe the interested testimony of petitioner's brother as to petitioner's age, even if the bases on which his brother estimated petitioner's age had been more convincing than they were (*supra,* pp. 6–7). A conviction must, in any event, be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser* v. *United States,* 315 U. S. 60, 80.

Moreover, even if petitioner was over 45 on February 16, 1942, there is certainly no dispute that he was under 65, and hence would have been required to register on April 27, 1942, under the terms of Presidential Proclamation No. 2541 (*supra,* p. 4). He did not register. This duty to register likewise survived beyond the registration date by virtue of § 611.5 (d) of the Regulations. It would seem that this failure to register

could be established under the indictment since the date of the offense charged in the indictment was laid under a videlicet and the indictment did not make reference to any particular Presidential Proclamation fixing a specified date of registration (R. 1–2).

CONCLUSION

The judgment below is correct and there is no real conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

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